Harlan J.

Field

Dec. 16. 1880

12-534

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 423. 153

WILLIAM B. WADSWORTH, APPELLANT,

VS.

THE BOARD OF SUPERVISORS OF EAU CLAIRE COUNTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED MAY 29, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 423.

WILLIAM B. WADSWORTH, APPELLANT,

vs.

THE BOARD OF SUPERVISORS OF EAU CLAIRE COUNTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

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1 Circuit court of the United States for the western district of Wisconsin.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a special term of the circuit court of the United States of America, for the western district of Wisconsin, begun and held according to law, at the city of Madison, in said district, on the first Tuesday (being the 4th day of December, A. D. 1877), present and presiding the honorable Romanzo Bunn, judge, among other the following proceedings were had, to wit:

WILLIAM B. WADSWORTH
v.
THE BOARD OF SUPERVISORS EAU CLAIRE County. } In equity.

Be it remembered that heretofore, to wit, June 8, 1877, came the complainant by his solicitors, Messrs. Dixon, Hooker, Wegg & Noyes, and on his application presented to the court copies of the process, &c., in this cause, certified by the clerk of the circuit court of Eau Claire County, within this district, including petition, bond on removal of said cause according to law, and it appearing from the record returned that the complainant is entitled to such removal under the provisions of the act of Congress approved March 2d, 1867, and the act of which the same is amendatory, and that he has in all respects complied with said act: Thereupon it is ordered by the court that the certified copies be filed and that the cause be placed on the dockets of this court and be proceeded in in the same manner as if the cause had been commenced here by original process.

Summons.

2 STATE OF WISCONSIN:

Circuit court Eau Claire County.

WILLIAM B. WADSWORTH, PLAINTIFF,
against
THE BOARD OF SUPERVISORS OF THE COUNTY of Eau Claire. } Summons for relief. Complaint served.

The State of Wisconsin to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action of which a copy is herewith served upon you, and to serve a copy of your answer on us, at our office Nos. 1, 2, & 3, Insurance Building, in the city of Milwaukee, State of Wisconsin, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid the plaintiff will apply to the court for the relief demanded in the complaint.

Dated Milwaukee, Nov. 6th, 1876.

DIXON, HOOKER, WEGG & NOYES,
Plaintiff Attorneys, Milwaukee, Wis.

Sheriff's return.

STATE OF WISCONSIN,
Eau Claire County, ss:

I hereby certify that on the 9th day of November, 1876, at the city and
county of Eau Claire, Wisconsin, I duly served the within summons and
annexed complaint upon the defendant, The Board of Supervisors of the
County of Eau Claire, personally, by delivering to and leaving with
Mathias Amstad, clerk of said county board, a true copy of the
3 within summons and complaint; and I further certify that on the
10 day of November, A. D. 1876, at the village of Augusta, Eau
Claire County, Wisconsin, I duly served the within summons and an-
nexed complaint upon the within named defendant, The Board of Super-
visors of the County of Eau Claire, by delivering to and leaving with
John C. Hackett, chairman of said board of supervisors, true copies
thereof.

Dated sheriff's office, Eau Claire County, November 10, 1876.

D. C. WHIPPLE,
Sheriff Eau Claire County.

Service, 1.50; travel, 5.00; copies, 6.00—12.50.

Complaint.

STATE OF WISCONSIN:

Circuit court Eau Claire County.

WILLIAM B. WADSWORTH, PLAINTIFF,
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY
of Eau Claire, defendant.

The above named plaintiff respectfully shows to the court and alleges:

That from prior to the year 1864 until the 4th day of June, 1867, the
Tomah and Lake St. Croix Railroad Company was a corporation duly
created, organized, and existing under and by virtue of the laws of the
State of Wisconsin, and as such corporation had the right, authority,
and power to survey, locate, and construct and to maintain and operate
a railroad with one or more tracks or lines from a point in the town of
Tomah, by way of Black River Falls, on the most feasible route to a
point on Lake St. Croix, between township 25 & 31; that on said
4 last mentioned day the board of directors of said corporation un-
der and by virtue of the provisions of chapter 285 of the private
and local laws of 1866, entitled "An act to legalize the organization of
the Tomah and Lake St. Croix Railroad Company with leave granted to
change the name of said company," by resolution changed the name of
said company to the "West Wisconsin Railway Company," ever since
which time the latter company has been and now is a corporation vested
with all the grants, rights, priveleges and immunities of every name and
nature therefor bestowed upon the said Tomah and Lake St. Croix Rail-
road Company; that the said county of Eau Claire, since prior to 1864,
has been and now is a municipal corporation organized and existing
under and by virtue of the laws of said State; that said county, by the
provisions of chapter 307 of the laws of 1864, had conferred upon it the
right, power, and authority in the manner therein specified by vote to

aid said company, in an amount not exceeding the sum of fifty thousand dollars, in the construction of its said line of road and to issue its bonds to pay therefor, and to make said contract upon the consideration that said company should locate, construct, and operate said line of road through said county and expend the money so granted in the construction of said road through said county; that no election was held in said county on the subject of such aid in the year 1864 as authorized by said chapter 307; that in the month of October, 1867, the petition required by section 8 of said chapter 307, signed by 22 of the qualified electors of said county, was presented to and filed with the clerk of the board of supervisors of said county, which petition requested that a proposition to aid the said company in the sum of fifty thousand dollars be submitted to the qualified electors of said county at the general election to be held therein on the 5th day of November, 1867, as will
5 more fully appear from said petition, which is made part hereof,
and of which the following is a full and correct copy.

To the clerk of the board of supervisors of Eau Claire County, Wisconsin:

The undersigned electors of the county of Eau Claire, and State of Wisconsin, do hereby petition you to give notice that the following question will be submitted to the electors of said county at the annual general election to be held on the 5th day of November, 1867, for railroad aid to the Tomah and Lake St. Croix Railroad Company to the amount of fifty thousand dollars.

Eau Claire, Wis., Oct. 24, 1867.

(Signed) J. A. Gray, C. N. Palmer, S. Slingluff,
E. R. Foster, S. D. Bungar, Geo. C. Teall,
J. B. Stocking, H. M. Stocking, E. M. Bartlett,
G. E. Porter, Sheriff Hatheway, G. R. Gleason,
G. W. Williams, Joseph G. Thorp, J. G. Calahan,
E. Robert Hantch, C. E. Chandler, Peter Truox,
Dewitt C. Clark, D. H. Ketchum, T. F. Kenyon.

That immediately upon the filing of such petition the said clerk did in a due and proper manner and in all respects as required by law, give public notice of the proposed submission of the said question of municipal aid to the electors of the said county at the general election to be held therein on said year.

That the aforesaid question of municipal aid to said company was submitted to the electors of said county at the said general election held on Tuesday, the 5th day of November, 1867; that said election was held and conducted in the same manner that other general elections are required by law to be conducted, and in the manner prescribed by
6 said chapter 307, and the votes cast at such election "for railroad
aid" and "against railroad aid" were counted, canvassed, and returned in the same manner as the votes at any general election in said county, and the canvassers made, certified, signed, and deposited with the said clerk a statement of the whole number of votes cast upon said question of railroad aid as well as a statement of the number "for railroad aid" and the number against railroad aid; and at said election a majority of the votes cast was in favor of such aid, as will more fully appear by inspection of such statement, which is made a part hereof, and of which the following is a copy.

Tabular statement of votes polled for county offices.

	Co. sup'r of schools.				District att'y.				Co. supervisors dist. No. 2.		
	A. Kidder.	W. H. Lockwood.	L. E. Lattimer.	H. Cousins.	W. Woodworth.	W. H. Bailey.	H. P. Graham.	Randall.	C. Bailey.	For railroad aid.	Against R. R. aid.
Bridge Creek	......	81	13	70	23	......	......	......	......	79	2
Otter Creek	1	60	27	59	28	......	......	......	......	2	79
Eau Claire	1	200	155	192	143	183	137	1	1	261	1
Pleasant Valley	......	18	8	10	16	4	21	......	......	9	7
Brunswick	1	32	24	......	......	29	24	......	......	11	26
West Eau Claire	......	102	190	164	126	......	......	......	......	115	106
Oak Grove	......	27	38	31	34	......	......	......	......	52	......
North Eau Claire	......	33	72	32	76	......	......	......	......	108	......
Lincoln	......	21	46	19	46	......	......	......	......	50	......
Total	3	574	553	557	492	216	182	1	1	688	221

Statement of county board of canvassers.

STATE OF WISCONSIN,
Eau Claire County, ss:

We, Martin Daniels, clerk of the county board of supervisors, and B.
C. Dunn, justice of the peace, and H. W. Barnes, county judge of
7 Eau Claire County aforesaid, constituting a county board of canvassers therefor, do hereby certify that the foregoing statement is correct and true as certified from the original returns made to the clerk of the county board of supervisors of said county and as compared therewith by us, and that from said returns it appears that at the annual election held in the several towns in said county on Tuesday, the 5 day of November, 1867, the whole number of votes given on the question of railroad aid was nine hundred and nine, of which number six hundred and eighty-eight were for railroad aid, and two hundred and twenty-one were for said railroad aid "no."

Given under our hands at the office of the clerk of the county board in Eau Claire County aforesaid this 12 day of November, 1867, and we certify that two erasures and corrections were made in the vote on railroad aid before signed.

MARTIN DANIELS,
Clerk County Board,
BENJ. C. DUNN,
Justice of the Peace,
H. W. BARNES,
County Judge,
Co. Board of Canvassers.

That said company, under the direction of competent engineers, surveyed a line of railroad upon the aforesaid route and located its line of road according to such survey. Said road was fully constructed on or about the first day of December, 1871, ever since which time it has been and now is run and operated as a railway by said company, and such line of road as surveyed, located, and constructed and operated was through the said county of Eau Claire, and was constructed through said county prior to March 10th, 1870.

8 That said company constructed its said line of railway through said county at a cost in the grading thereof and in the purchase of ties therefor greatly in excess of fifty thousand dollars, as the said board of supervisors well know, and such work was done and money expended by the said company upon the faith and credit of such aid granted by said county, and with the full understanding and belief that said bonds would be issued and delivered to said company as the said county had promised and agreed, and said company built said road through said county and expended the money therefor as aforesaid solely and wholly upon the understanding and belief that the said contract of said county would be performed upon its part and the said bonds issued and delivered to said company in accordance with the terms thereof, and the said company would not have built said road and expended said money except upon the faith and credit of and reliance upon said contract made with said county, as the said county well knew.

That said company, prior to the demand hereinafter mentioned, fulfilled all the conditions and performed all the acts upon its part to be kept and performed which are in any manner precedent to the issuing and delivering of the said bonds as aforesaid, and of which the said board of supervisors had notice, and it thereupon became and was the duty of the said board of supervisors to cause to be issued the bonds of said county of a denomination of not less than one hundred dollars nor more than one thousand dollars each, amounting in aggregate to the sum of fifty thousand dollars, and deliver the same to said company.

9 That on and prior to the 15th day of March, 1870, said company duly demanded said bonds from the board of supervisors of said county, which demand was then and there refused, whereupon the said board of supervisors formally made and recorded their refusal in the minutes of their proceedings in the words and figures following, viz:

The county board of supervisors of Eau Claire County met at the office of the clerk; all members present. The board took up the subject of issuing the bonds of the county to the West Wisconsin Railroad Co. as voted in 1867, and expressed themselves as willing to issue the bonds of the county if they could be paid by a tax as understood at the time the vote was taken, but as our highest courts have decided that it is illegal to levy and collect a tax to pay such bonds they refuse to issue them. They are unwilling to issue the bonds of the county which cannot be paid, but must be repudiated in the end, for reason that it would be unjust to the bondholder and a disgrace to the county, and requested the county board of supervisors of said county to cause said bonds to be issued and delivered to the said company as required by law and the aforesaid vote of the electors of said county.

That said board of supervisors refused to comply with such demand, and has ever since and does now neglect and refuse to take any steps whatever to comply with such demand and to cause said bonds to be issued and delivered as aforesaid.

That on or about the 1st day of September, 1875, and prior to the
commencement of this action, the said company for a valuable con-
sideration, by an instrument in writing, duly and properly
10 assigned, transferred, and set over to the plaintiff all and every
cause of action in law and equity which it then had or was en-
titled to against the defendant herein for failure to issue and deliver
the said bonds as aforesaid. Wherefore the plaintiff prays that the
said defendant may be decreed specifically to perform the said contract

entered into as aforesaid and to execute and deliver the bonds to the plaintiff in accordance with the terms of said contract, and to pay the costs herein, and that the plaintiff may have such further and other relief as to the court may seem meet and the nature of the case require.

DIXON, HOOKER, WEGG & NOYES,
Plaintiff's Attorneys, Milwaukee, Wisconsin.

I hereby certify that the above and foregoing is a true copy of the original summons and complaint, and a true copy of the sheriff's return, endorsed on the back of said summons, which was filed in my office on the 23d day of November, A. D. 1876.

In witness whereof, I hereunto set my hand and seal on the 23d day of November, A. D. 1876.

M. B. HUBBARD,
Clerk Circuit Court.

Demurrer.

STATE OF WISCONSIN:

Circuit court Eau Claire County.

WILLIAM B. WADSWORTH
against
THE BOARD OF SUPERVISORS OF THE COUNTY
of Eau Claire.

11 And now comes the defendant in the above entitled cause by L. Edwards, district attorney, and Bartlett & Hayden, defendant's attorneys, and demurs to plaintiff's complaint herein, and alleges as grounds of said demur—

First. The complaint in this action does not state facts sufficient to constitute a cause of action.

Second. That said action having been commenced on the 9th day of November, 1876, by service of the summons and complaint on that day, and the plaintiff having alleged his cause of action in said complaint as of March 15, 1870, and more than six years prior to the commencement of said action, it appears upon the face of said complaint that plaintiff's alleged cause of action is barred by the statute of limitations.

LOREN EDWARDS,
Dist. Att'y.
BARTLETT & HAYDEN,
Def't's Att'ys.

Circuit court, Eau Claire County.

WILLIAM B. WADSWORTH
against
THE BOARD OF SUPERVISORS OF EAU CLAIRE
County.

We do hereby certify that the demurrer to plaintiff's complaint in the above entitled action, which demurrer is hereunto annexed, is well founded and made in good faith.

Dated November 22, 1876.

BARTLETT & HAYDEN,
Defendant's Attorneys.

12 *Petition for removal.*

STATE OF WISCONSIN:

Circuit court, Eau Claire County.

WILLIAM B. WADSWORTH
agt.
THE BOARD OF SUPERVISORS OF THE COUNTY of Eau Claire.

To the honorable the circuit court of the State of Wisconsin, in and for the county of Eau Claire:

The petition of William B. Wadsworth, the above-named plaintiff, respectfully shows that the above entitled action is one of a civil nature in equity, to wit, one for the specific performance of an alleged contract, and is now pending in said court; that the matter in dispute therein exceeds, exclusive of costs, the sum or value of five hundred dollars. That your petitioner is a resident of the city of New York, in the State of New York, and a citizen of that State, and the defendant in said action is a citizen of the said State of Wisconsin.

Your petitioner therefore prays that the said action may be removed into the circuit court of the United States for the western district of Wisconsin, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had therein in this cause, and your petitioner will ever pray, etc.

Dated Milwaukee, November 17, 1876.

WILLIAM B. WADSWORTH,
By DIXON, HOOKER, WEGG & NOYES,
His Attorneys.

13 STATE OF WISCONSIN,
Milwaukee County, ss:

Luther S. Dixon, being duly sworn, says that he is a member of the law firm of Dixon, Hooker, Wegg & Noyes, who are attorneys for the above named plaintiff and petitioner, and makes this affidavit in behalf of the petitioner. Affiant further says that he has heard read the foregoing petition, knows the contents thereof and verily believes the same to be true, and also believes that the said petitioner is not now within the limits of the State of Wisconsin, but in the city of New York, in the State of New York.

LUTHER S. DIXON.

Subscribed and sworn to before me this 17th day of November, 1876.

HUGH RYAN,
Notary Public, Milwaukee County, Wis.

Bond on removal.

STATE OF WISCONSIN:

Circuit court, Eau Claire County.

WILLIAM B. WADSWORTH
agt.
THE BOARD OF SUPERVISORS OF THE COUNTY of Eau Claire.

We, A. J. Goss and James B. Martin, of the city of Hudson, in the county of St. Croix, in the State of Wisconsin, are held and firmly bound unto the above named defendant, the Board of Supervisors of the 14 County of Eau Claire of said State, in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said board of supervisors of the county of Eau Claire, their successors or assigns, for which payment well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated this tenth day of November, A. D. 1876.

Whereas the above entitled action is now pending in said court, and William B. Wadsworth, the plaintiff therein, herewith files his petition in said action for the removal of said cause into the circuit court of the United States for the western district of Wisconsin:

Now, therefore, the condition of the above obligation is such that if the said William B. Wadsworth shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in the above entitled action, and shall pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said action is wrongfully or improperly removed thereto, and shall do or cause to be done such other appropriate acts as are required to be done upon a removal of a suit into the United States court, then the above obligation to be void, otherwise to remain in full force and virtue.

A. J. GOSS. [SEAL.]
J. B. MARTIN. [SEAL.]

In presence of—
N. H. CLAPP.
CHAS. HAUSER.

STATE OF WISCONSIN,
Eau Claire County, *ss:*

A. J. Goss and J. B. Martin, being severally duly sworn, doth 15 each for himself depose and say that he is one of the obligors in the above obligation, and that he executed the same fully and voluntarily for the purpose therein mentioned, that he is a resident and freeholder of the said State of Wisconsin, and is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

A. J. GOSS.
J. B. MARTIN.

Subscribed and sworn to before me this 10th day of November, A. D. 1876.

NEWEL H. CLAPP,
Notary Public, St. Croix Co., Wis.

At a stated term of the circuit court of the United States for the western district of Wisconsin, begun and held according to law at the city of La Crosse, on the third Tuesday (being the eighteenth day) of September, A. D. 1877, and on the 1st day of said term, to wit, on the 18th day of September, A. D. 1877, the following proceedings were had, to wit:

WILLIAM B. WADSWORTH
v.
THE BOARD OF SUPERVISORS OF EAU CLAIRE
County.

This day came the parties by their counsel, and the demurrer interposed by the defendant to the complainant's bill of complaint came on to be heard before the honorable Thomas Drummond, judge of the circuit court, and the hearing being concluded the same was held under advisement.

16 And afterwards, to wit, on the 22d day of September, in the September term, A. D. 1877, of said court, in the record and proceedings thereof of said entitled cause, before the honorable Thomas Drummond, judge, is the following entry:

WILLIAM B. WADSWORTH
v.
THE BOARD OF SUPERVISORS OF THE COUNTY
of Eau Claire.

This cause came on to be heard at this term, and the demurrer interposed by the defendant to the complainant's bill of complaint was argued by counsel and submitted. On consideration, it is ordered and adjudged that the demurrer be, and the same is hereby sustained.

And afterwards, to wit, at a special term of said court begun and held at the city of Madison on the first Tuesday (being the 5th day) of December, A. D. 1877, and in the nineteenth day of said term, to wit, on the third day of January, A. D. 1878, before the honorable Romanzo Bunn, judge, is the following entry:

WILLIAM B. WADSWORTH
v.
THE BOARD OF SUPERVISORS OF THE COUNTY
of Eau Claire.

This day came the parties by their respective solicitors, and thereupon, on motion of defendant's solicitors, it is ordered, adjudged, and decreed that the complainant's said bill of complaint be dismissed for want of equity; and it is further ordered and adjudged that the 17 said defendant recover of said complainant the sum of fifty dollars and fifty cents, its costs, and that it have execution therefor.

Whereupon said complainant prays an appeal, which is granted, upon the complainant executing and filing a bond in the penal sum of one thousand dollars.

On this day, to wit, the first day of March, A. D. 1878, came said complainant, by their solicitors, and filed in said court in said entitled cause his bond on appeal, which said bond is in words and figures following, to wit:

Know all men by these presents, that we, Marcus A. Fulton, David C. Fulton, and John E. Glover, all of the city of Hudson, county of St. Croix, State of Wisconsin, are held and firmly bound unto the board of supervisors of Eau Claire County in the penal sum of one thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 28th day of February, A. D. 1878.

The condition of the above obligation is such that, whereas, on the third day of January, A. D. 1878, a decree was rendered by the circuit court of the United States for the western district of Wisconsin, in the suit of William B. Wadsworth, complainant, against the board of supervisors of Eau Claire County, defendant, that the said complainant's bill should be dismissed, and that the said defendant should recover of the said complainant its costs in its defense in that behalf expended, from which decree of said court the said complainant prayed an appeal to the Supreme Court of the United States, which appeal was allowed
18 by said court upon the condition that the said complainant should enter into bond with sufficient surety in the penal sum of one thousand dollars, conditioned as the law directs:

Now, if the said complainant shall prosecute his said appeal with effect and without delay, and shall pay the amount of said decree and all costs that may be adjudged against him in said suit in case the said decree shall be affirmed in the said Supreme Court of the United States, then this bond to be void, otherwise in full force.

MARCUS A. FULTON. [SEAL.]
DAVID C. FULTON. [SEAL.]
JOHN E. GLOVER. [SEAL.]

Approved.

R. BUNN.

WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Steward, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and also a true copy of the bond in said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Madison, this 19th day of April, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and second.

[SEAL.] F. M. STEWARD, *Clerk.*

(Indorsement on cover:) No. 423. William B. Wadsworth, appellant, vs. The Board of Supervisors of Eau Claire County. W. Wisconsin C. C. U. S. Filed 29th May, 1878.

OFFICE SUPREME COURT U.S.
FILED
NOV 3 1880
JAMES H. McKENNEY, Clerk.

BRIEF AND ARGUMENT FOR APPELLANT.

IN THE

United States Supreme Court.

WILLIAM B. WADSWORTH,
Appellant,
vs.
THE BOARD OF SUPERVISORS OF EAU CLAIRE COUNTY.

IN THE

United States Supreme Court.

WILLIAM B. WADSWORTH,
Appellant,
vs.
THE BOARD OF SUPERVISORS OF EAU CLAIRE COUNTY.

APPELLANT'S BRIEF AND ARGUMENT.

STATEMENT.

This is an appeal in equity from the decree of the Circuit Court of the United States for the Western District of Wisconsin. The suit was removed by the plaintiff from the State Court to the Circuit Court. The questions presented by the record and hereafter to be considered were raised by demurrer to the bill of complaint before the removal of the suit from the State Court. After removal to the Circuit Court the demurrer was argued and sustained, and the complaint "dismissed for want of equity." From the decree so dismissing it this appeal has been prosecuted.

The following allegations in the bill stand admitted by the demurrer:

From a date prior to 1864, the Tomah & Lake St. Croix Railroad Company had been a Wisconsin corporation authorized to construct and operate a railroad from a point in the town of Tomah, in that State, to a point named on lake St. Croix. On June 4, 1867, the name of the corporation was duly changed to "The West Wisconsin Railway Company." The defendant, the county of Eau Claire, which, by the laws of Wisconsin at the time this action was instituted, could only be sued by the name and as herein entitled, has been an organized county in Wisconsin from a date prior to 1864. By the provisions of chapter 307 of the Laws of Wisconsin for the year 1864, the county was empowered, by vote, to agree to aid the railroad, in an amount not exceeding $50,000, in the construction of its road, and to issue its bonds therefor, and to make such contract upon consideration that the company should locate, construct and operate the road through the county, and expend the money so granted in such construction through the county.

In the month of October, 1867, the petition required by section 8 of the act of 1864 was duly made, presented to and filed with the clerk of the board of supervisors, requesting that the question of the aid be submitted to the electors of said county at the annual general election to be held on the 5th day of November, 1867. The petition is set out in the complaint, and will be found at folio 5, page 3, of the record. The question to be submitted for the determination of the voters was:

"For aid to the Tomah & Lake St. Croix Railroad Company to the amount of fifty thousand dollars."

The petition was signed by more than twice the requisite number of electors, and, immediately upon its being filed, due notice in all respects as required by law was given by the clerk of the submission at the general election then next to be held on the 5th day of November.

The election was held, and, upon this question as well as others, was fully and generally participated in by the electors of the county, and their votes were duly given, counted, canvassed and returned to the proper officers, who immediately, and as required by law, certified and deposited with the clerk of the board of supervisors a tabular statement of the whole number of votes cast. This statement appears in the complaint. (Record, p. 4, folio 5.) It appears from the statement that the whole number of votes cast upon the question of aid to the Tomah & Lake St. Croix Railroad Company was 909, of which 688 were "for railroad aid," and 221 were "against railroad aid." It further appears from the statement that the question was voted upon in every town or election precinct in the county, and that the highest number of votes cast in the county at that election upon any question or for any purpose was 1,130. The statement shows that two county offices were to be filled at the same election, and that the whole number of votes polled for the respective candidates for one of the offices was 1,130, and for the other 1,049.

The election and its result having been thus publicly and officially declared and made known, the railroad company thereupon accepted the promise and agreement of the county, so made and shown by the vote, to furnish the aid, and upon the faith thereof, and relying upon the fulfillment of such promise and agreement, as the proper officers of the county well knew, proceeded to survey, locate and construct its road through the county, and the same was constructed and operated through the county prior to the 10th day of March, 1870, and is still so run and operated. The road was completed and put in operation in its entire length from Tomah to lake St. Croix on or about the first day of December, 1871, and has ever since been maintained and operated. The allegation of the bill is: "That said company constructed its said line of railway through said county at a cost in the grading thereof, and in the purchase of ties therefor, greatly in excess of fifty thousand dollars, as the said board of supervisors well knew, and such work was done and money expended by said company upon the faith and credit of such aid granted by said county, and with the full understanding and belief that said bonds would be issued and delivered to said company as the said county had promised and agreed, and said company built said road through said county and expended the money therefor as aforesaid solely and wholly upon the understanding and belief that the said contract of said county would be performed on its part, and the said bonds issued and delivered to said company in accordance with the terms thereof, and the said company would not have built said road and expended said money except upon the faith and credit of and reliance upon said contract made with said county, as the said county well knew."

The company has performed all conditions precedent to the issue and delivery of the bonds, and it has long been the duty of the board of supervisors so to do.

On and prior to the 15th day of March, 1870, the company duly demanded the bonds from the board of supervisors of the county, which demand was then and there, March 15, 1870, refused, and the board of supervisors formally made and recorded their refusal in the minutes of their proceedings, in the words and figures following, viz.:

"The county board of supervisors of Eau Claire county met at the office of the clerk; all members present. The board took up the subject of issuing the bonds of the county to the West Wisconsin Railroad Co., as voted in 1867, and expressed themselves as willing to issue the bonds of the county, if they could be paid by a tax, as understood at the time the vote was taken; but as the highest Courts have decided that it is illegal to collect a tax to pay such bonds, they refuse to issue them. They are unwilling to issue the bonds of the county which cannot be paid, but must be repudiated in the end, for the reason that it would be unjust to the bondholder and a disgrace to the county."

The board refused to comply with the demand, and has ever since and now does refuse to do so.

On or about the first day of September, 1875, and prior to the commencement of this suit, the company, for a valuable consideration, by an instrument in writing, assigned to the plaintiff all and every cause of action which it then had or was entitled to against the county for the failure to issue and deliver the bonds.

The plaintiff therefore prays that the defendant may be decreed specifically to perform its contract to execute and deliver the bonds, and for such other and further relief, etc.

The following are the statutes upon which the case arose:

Chapter 307, General Laws of Wisconsin, 1864.

[Published April 20, 1864.]

AN ACT to authorize certain counties, therein named, to aid in the construction of a railroad from Tomah to lake St. Croix, by the Tomah & Lake St. Croix Railroad Company.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. At the annual town meeting for the election of town officers, to be held in and for the different towns comprising the counties of St. Croix, Dunn, Chippewa, Pierce, Eau Claire, Buffalo, Clark, Trempealeau, Jackson, Pepin and Monroe, in the year one thousand eight hundred and sixty-four, or at any subsequent annual town meeting or general election held in each and any of said towns comprised in any one of said counties, the legal voters of said counties, or either of them, may deposit ballots, written or printed, in words as follows, to wit: "For railroad aid," or "against railroad aid." Such ballot shall be deposited in a separate box provided for that purpose by the inspectors of election, and such ballots shall be considered as the votes of the legal voters upon such question, and shall be counted, canvassed and returned to the proper officers as in other elections, and as provided under the election laws of the State, applicable thereto; *provided*, ten days' notice of such submission shall be given by the sheriffs of the said counties, respectively, by posting in each town in the county, in four public places, a written or printed notice stating that a submission of the question of railroad aid will be had.

SECTION 2. If a majority of the ballots cast in any of said counties be "for railroad aid," the county board of supervisors of said counties shall have power, by resolution, to cause to be issued bonds of a denomination of one hundred to one thousand dollars each, to an amount not exceeding fifty thousand dollars for each of said counties, payable thirty years after the date thereof, with interest at the rate of seven per centum, payable semi-annually in the city of New York, at such place as the Treasurer of the State shall designate.

SECTION 3. The county board of supervisors of each of said counties shall annually cause to be levied and collected, as other State and county taxes are collected, a sum of money sufficient to pay the interest accruing and existing by reason of the bonds which either of said counties may issue, at the rate aforesaid, and such further amount to defray any expense attending the payment of such interest. The county treasurer of each of said counties shall pay over the same to the State Treasurer, who shall receive and apply the same to the payment of such accruing interest at the time or times, place or places, when and where the same shall become due.

SECTION 4. From and after the fifteenth year after the issue of bonds by any of said counties, the board of supervisors of each of said counties, respectively, shall annually cause to be levied and collected, as a special tax for that purpose, in the manner State taxes are collected, a sum not exceeding five per cent. of the amount of bonds which may have been issued or which may remain outstanding at such time; the amount so annually collected in said counties as aforesaid to be paid over by the county treasurer of each thereof to the State Treasurer. The State Treasurer, with the proceeds, shall annually apply the same to the payment of the bonds so outstanding against each of said counties; and in the event of not being able to find parties who may hold the same willing to receive payment thereon, in that event the State Treasurer shall invest such amounts so received in State or United States stocks, and shall receive thereon the amount of interest arising therefrom, and shall re-invest such interest in such stocks, and shall annually report to the county boards of each of said counties the manner in which he has invested such amounts so paid to him as aforesaid, and the condition of the fund so annually to be raised for the period aforesaid as a sinking fund. The State Treasurer shall, during the year previously to the time any of the bonds issued by any of said counties shall become due, realize upon the investments made by him for the purpose of paying and redeeming said bonds, and notify the board of supervisors of each county at least one year before such bonds become due of the probable amount which he has or will realize from such securities, and the amount of bonds outstanding against each of said counties, and the probable deficiency which will remain after applying such amount so realized in payment of said bonds, together with all proper costs and charges. That it shall be the duty of each of the boards of supervisors of said counties to cause to be collected and paid over to the Treasurer of the State, during the year previously to the maturity of any of said bonds, a sum sufficient to make up the same amount due, and that the same be paid over by the county treasurers of said counties to the State Treasurer, who shall apply the same in the payment and cancellation of said bonds when they become due.

Section 5. For the purpose of promptly meeting the first installment of interest, or any future deficiency before the taxes herein authorized to be collected for any bonds which any of said counties may issue, the board of supervisors of each of said counties shall have power to make temporary loans for any term not exceeding six months, but such loan shall not exceed seventy-five per centum of the tax levied and assessed for the purpose for which such loans may be made, and such temporary loans shall be paid by the Treasurer of the State out of the tax when collected.

Section 6. Any future dismemberment of the present territory comprising any of the counties aforesaid, by the erection of a new county or otherwise, the portion detached shall continue to be taxed for the purposes herein and by this act provided, the same as if such detachment had not been made, and according to the value of the property therein.

Section 7. The said bonds, when authorized to be issued as aforesaid, shall be held by the county board of supervisors of each of said counties, and the same, or the avails thereof, shall be expended in the counties which issued the same, provided the railroad passes through the said county, in the grading of said railroad or in the purchase of ties therefor; and the said bonds shall be delivered to the said railroad company when the board of supervisors of each of said counties are satisfied that the same will be applied for such purpose.

Section 8. If from any cause the said question is not submitted to the electors of either of said counties at the annual town meeting, on the first Tuesday of April, one thousand eight hundred and sixty-four, it shall be submitted at any election or town meeting thereafter, when any ten electors of said county shall file with the clerk of the county board of supervisors a petition therefor; and when such petition is thus filed the said clerk shall give notice of the proposed submission of such question in the same manner as notices of general elections are now required by law to be given by the sheriff.

SECTION 9. This act shall take effect and be in force from and after its passage and publication.

Approved April 1, 1864.

Chapter 116, Private and Local Laws, 1872.

[Published April 5, 1872.]

AN ACT to repeal a portion of chapter 307 of the General Laws of 1864, entitled "An Act to authorize certain counties, therein named, to aid in the construction of a railroad from Tomah to lake St. Croix, by the Tomah & Lake St. Croix Railroad Company."

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. So much of chapter 307 of the General Laws of 1864, entitled "An Act to authorize certain counties, therein named, to aid in the construction of a railroad from Tomah to lake St. Croix by the Tomah & Lake St. Croix Railroad Company," as authorizes the issue by the county of St. Croix and the county of Eau Claire of any bonds in aid of the construction of said railroad, is hereby repealed.

SECTION 2. All acts or parts of acts conflicting with the provisions of this act are hereby repealed.

SECTION 3. This act shall take effect and be in force from and after its passage.

Approved March 25, 1872.

It is proper here to remark as a part of the history of this cause that an action at law upon the same facts was first instituted by the plaintiff to recover damages under the statute for the refusal of the defendant to issue the bonds. Upon demurrer to that complaint the Circuit Court, at the

June term, 1876 (Mr. Justice Davis and the District Judge, Hopkins, presiding), held, sustaining the demurrer, that the remedy of the plaintiff was not at law to recover damages, but in equity to compel the execution and delivery of the bonds. Some of the reasons for such holding will appear hereafter. Thereupon this suit in equity was instituted.

It is proper here to note also an error in the printed record, where, at the end of page 2, the words "agree to" are omitted. The complaint should read: "Had conferred upon it the right, power and authority, in the manner therein specified, by vote, to agree to aid said company," etc.

The Court below, Judge Drummond presiding, sustained the demurrer to the bill of complaint upon the ground, it is understood, no written opinion having been given or filed, that no contract had been entered into or existed between the county and the railroad company for the issuing and delivery of the bonds.

ASSIGNMENT OF ERRORS.

I.

The Circuit Court erred in holding that there was no contract between the defendant and the railroad company for the issuing and delivery of the bonds.

II.

The Court erred in sustaining the demurrer and dismissing the bill of complaint. The demurrer should have been overruled and the complainant should have had decree according to the prayer of his complaint.

POINTS OF LAW.

The principal questions to be considered are:

First—Whether the election by the voters of the county to furnish the stipulated amount of aid, and the acceptance by the railroad company, and the building and putting in operation of the road by it on the faith of such election, and the subsequent action of the board of supervisors when demand was made, acknowledging their obligation and expressing their willingness to issue the bonds but for the reason stated in the minutes of their proceedings, constituted a contract between the county and the company for the execution and delivery of the bonds as provided by the act and declared by the electors to be their will and purpose.

Second—Whether the complaint presents a proper case for equitable relief.

Third—Whether the election was regularly notified and held according to the terms of the act.

Fourth—Whether the action of the plaintiff is barred by the statute of limitation.

I.

The facts stated in the complaint constitute a contract between the railroad company and the county. Under the statute such was the clear effect of the election, of the subsequent acts of the company in constructing its road, and of the action of the board of supervisors taken when demand was made for the issue of the bonds.

Indeed it seems clear, without the subsequent action of the board of supervisors recognizing the obligation and validity of the contract of the county to issue the bonds, that, under a proper construction of the statute, such contract existed as the necessary and proper legal result of the election and of the building of the road under the circumstances stated in the complaint. The statute differs very widely in its material and important features from those statutes under which this Court and others have decided that the mere affirmative vote of the electors did not constitute a contract between the county and the railroad company. It differs very widely, for example, from the statute under consideration in *Aspinwall* v. *Commissioners of the County of Daviess*, 22 How., 364, and in some other cases in this Court. This is not a statute authorizing the supervisors of the county, upon a previous vote of the electors, to enter into a *contract of subscription* to the stock of the railroad company. The statute neither authorizes nor contemplates the making of any such contract by the supervisors. Where that is the nature of the statute or of the act to be done, it has been decided by this Court that no contract exists until the subscription has been made by the public officers clothed with authority to do so, or until some other equivalent action has been had or steps taken on their part.

The power conferred upon the supervisors in this case was not a power to negotiate or to enter into a contract with the railroad company, like the contract of subscription for stock, but was a power merely "to cause" the bonds to be issued in pursuance of the declared will of the voters, which, with the acceptance by the railroad company and performance on its part according to the terms of the statute, constituted the contract between the county and the company. The supervisors were clothed with no power of treaty or negotiation whatever with the railroad company, but simply with power, "by resolution, to cause to be issued bonds of the denomination" specified by the statute and in the amount fixed by the electors by their ballots deposited at the polls. On the face of the statute this function and office of the supervisors to pass a resolution was purely ministerial. The language of the statute is "*to cause* to be issued," not "*to authorize* to be issued." This plainly implies an obligation or, duty on the part of the supervisors to perform the act to which they are empowered, in pursuance of some previous command or authority given, some previous contract, promise or liability incurred, in satisfaction of which the bonds are to be issued.. It plainly implies that the office of the supervisors, that to which they are empowered, is to cause something to be done, namely, the issuance of the bonds, in discharge of a pre-existing obligation or liability on the part of the county whose bonds are to be issued. "If a majority of the ballots cast in any of said counties be 'for railroad aid,' the county board of supervisors of said counties shall have power, by resolution, *to cause to be issued* bonds of a denomination," etc., is the language of the second section. What does this language signify other than a mere purpose and intention on the part of the Legislature to confer upon the board of supervisors a power to discharge an existing indebtedness or obligation on the part of the county in the manner prescribed by the statute? Was not such clearly the object of the Legislature, and is not such the true interpretation of the statute? It is submitted with confidence that it was and is. The words "to cause to be issued," are an equivalent form of expression, and signify the same thing as "to cause to be executed and delivered," and if these had been the words used in the statute no reasonable doubt about the interpretation could have arisen. Either form of expression implies the execution and delivery of the bonds in pursuance and in satisfaction of some previously consummated contract or obligation. They imply such execution and delivery in payment or discharge of such contract or obligation, and not as the creation or origin of it or of the liability of the county to the railroad company. They exclude the idea, therefore, of a discretion on the part of the board of supervisors to cause or not to cause the bonds to be issued, as it may see fit.

Under the statute, therefore, and if we consider the language of the second section alone conferring the power to cause the bonds to be issued, the effect of the election and the subsequent acts of the company was to impose upon the county a contract or obligation to issue the bonds. That section is mandatory, and not permissive merely. It imposed a duty upon the board of supervisors to issue the bonds, and the case falls fully within the clearly settled principle that where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of individuals, the execution of the power may be enforced as a duty, notwithstanding the language of the statute is permissive and not peremptory.

Supervisors vs. United States, 4 Wall., 435, and cases cited.
City of Galena vs. Ames, 5 Wall., 705.

The transactions in question related to the building of a railroad, in itself a matter of public interest and so made by the statute. With this public interest the private rights of the plaintiff and those under whom he claims became necessarily involved. The private right could be made effectual only through the action of the board of supervisors. The case is fairly within the principle by which contracts of this character have been frequently enforced,

People vs. Martin, 58 Barb., 286.
Napa Valley R. R. Co. vs. Napa Co., 30 Cal., 435.
Olcott vs. The Supervisors, 16 Wall., 678.

That the company accepted the proposition to aid it and acted upon that proposition by full and complete performance, is fully alleged in the complaint and admitted by the demurrer. The acceptance of the proposition, either by formal notice or by entering upon the work, made binding the contract. Performance by the company, thereafter, entitled it to the consideration.

State vs. Town of Lime, 23 Minn., 521.
Fry on Sp. Perf., Secs. 166, 184, 187, 189.
Warsop vs. The City of Hastings, 22 Minn., 437.

In the case cited from 23 Minn. the Court say: "The adoption of the resolution created a statutory and legal obligation against the town in favor of the company therein named, to issue to it the amount of bonds therein provided, upon the performance of its conditions and in compliance with its terms by the latter; and the supervisors were authorized and directed to do the *ministerial duty of executing and delivering the bonds whenever the conditions were fulfilled; and this was the extent of their authority.* No formal acceptance nor written agreement is required of the company to give validity and effect to the resolution. It was in the nature of a standing offer, which the company was at liberty, at any time before it was rescinded or withdrawn, to avail itself of, by entering upon the construction of the road and complying with the terms and conditions of the resolution, in the manner and within the time specified. By beginning the building of the road in 1870, the company secured to itself the right to go on and comply with the conditions of the resolution, and to insist upon the observance of the obligation on the part of the town."

Such seems plainly the character and interpretation of the statute here in question, of the election of the voters held under it, and of the acts of the company in acceptance of the proposition and in grading and purchasing ties for the road through the county, to which purposes it is declared by a subsequent section of the statute the said bonds or the avails thereof *shall* be devoted. If the facts so stated in the complaint did not constitute a contract between the county and the company, which, after full performance by the company by the building and putting of the road in operation through the county, bound the board of supervisors to cause the bonds to be issued, then it is difficult to conceive what, under such or any like circumstances, could constitute a contract.

Without the statute the county was a body corporate whose powers did not permit it to contract the obligation in question. Hence the statute was enacted to give this authority to the county, not to add to the powers of its ministerial officers. Such is the title of the act, and such the plain purpose indicated throughout its provisions. The county was thus authorized and a mode provided for the electors to decide in their primary capacity whether the county should thus obligate itself. If they decided in the affirmative, further action as to the officers was merely the ministerial duty of carrying out such expressed instruction. It is perverting the statute and misplacing and inverting the natural order to say that this express determination, "for railroad aid," offered, accepted and acted upon, was after all a mere permission to the ministerial officers of the county to afford the aid or not, as they saw fit.

Either this is the true meaning and construction of the statute, or else it was most artfully designed to entrap and to deceive—"to keep the word of promise to the ear and to break it to the hope."

It may be urged that the board of supervisors had a discretion as to the amount of bonds which should be issued, the language of the statute being "to an amount not exceeding fifty thousand dollars." This was a limitation set by the Legislature to the power of the county, designed to operate as well upon the electors voting at the polls as upon the board of supervisors in performing the act of causing the bonds to be issued. If the electors, within the limitation, failed to fix the amount of bonds to be issued at the election, then the limitation took effect upon the board of supervisors and they were prohibited from causing bonds to be issued beyond that amount. In case the electors failed to declare the amount the board of supervisors could not exceed the limitation, but might fix a less amount.

But in this case the electors directed the supervisors what the amount of the aid should be. They declared it should be the sum of fifty thousand dollars. They had this authority to determine the amount and give a direction to the board of supervisors by which the board were bound. This proposition is well settled in the local jurisprudence and judicial interpretation of statutes of this nature in the State of Wisconsin. It has been more than once decided by the Supreme Court of that State that such is the power and authority of the electors acting under such statutes, although the statutes themselves are silent upon the subject or make no provision for the exercise of such authority by or on the part of the electors. This was expressly so held in *Phillips* v. *The Town of Albany*, 28 Wis., 342. In that case the electors, acting in their primary capacity, embodied in the documents which, with their elective act, constituted a contract, certain restrictions, limitations and safeguards, not provided for in the statute, but which nevertheless were adopted in the exercise of the power to contract. The proposition by the company, the qualifications in the petition signed by the ten freeholders, voters and residents of the town, requesting the election to be held, and the limitations in the notice of the election, were none of them provided for by the statute. That statute was like this, an authority to vote "yes" or "no" upon the abstract question. Yet the Court held that these methods of limitation, being within the general power, bounded by it, and prudent and beneficial in their character, were valid. In the case at bar the only limitation imposed by the vote was to direct the bonds to issue in the sum of $50,000. The electors clearly had this right under the statute as expounded by the Supreme Court of the State, and no discretion whatever was left to be exercised by the board of supervisors—nothing but the mere ministerial act of causing the bonds to be issued, which the statute declares the board "*shall* have power by resolution" to do. The contract was a completely executed and binding one, by the vote, by the acceptance by the railroad company, and by the performance on its part of all the conditions to be fulfilled.

And that such was the true character of the decision in the case last cited, the Court is referred to the subsequent case of *Lawson* v. *Schnellen*, 33 Wis., 288, 295, where the same doctrine is reiterated, and where the Court, commenting upon the same decision, say: "And in *Phillips* v. *Albany, supra*, speaking of a case where, *without express authority given, or requirement made by the Legislature*, a special agreement had been entered into, or proposition submitted by the railroad company, *which had been ratified by the voters*, this Court said: 'If the proceeding here was to restrain the officers or authorities of the town from violating the terms of the agreement, or executing and delivering the bonds contrary to its provisions, and that fact were shown, we should have little difficulty in upholding the injunction.'"

Again, in *Board of Supervisors of Douglass county* v. *Walbridge and others*, 38 Wis., 179, the Court say: "For to our minds the resolution of the county board extending the time for the completion of the road, and making other changes in the *proposition upon which the aid was granted by a vote of the electors*, was without authority and void. The agreement which was entered into between the county board and the Superior & St. Croix Company, and which was submitted to the electors when aid was voted, could not be essentially modified or changed by the county authorities. (*Lawson* v. *Schnellen*, 33 Wis., 288.) The reason of this view is given in the case cited, and it is because the inhabitants or voters of the county are the real contracting party on the one side, and the railroad company on the other, the county board being merely agents of the former to execute a special authority."

Plainer language than this to show, under the decisions of the Supreme Court expounding and construing statutes of this nature passed by its Legislature, that the voters, acting in their primary capacity and in the exercise of their choice or will at the polls, may enter into a valid and binding contract which shall control the public officers and all others in all future proceedings, could not well be used. Such is beyond doubt the well settled and undisputed law and rule of statutory construction and interpretation in the judicial tribunals of the State, and by such construction and interpretation this Court is bound and will be governed.

And that such has been the long established, uniform and unvarying rule of statutory interpretation in cases of this nature, namely, that under such statutes the voters are the real contracting party on one side and the railroad company on the other, and, therefore, that the voters are capable of contracting for and of binding the county by their elective act, we cite the Court to the early decision, made in 1861, in *Rochester* v. *The Alfred Bank,* 13 Wis., 431, 439, where the Court say: "The voters or inhabitants of the town being the contracting party on one side, and the railroad company upon the other, and the supervisors the mere agents of the former, having no power to act without their assent, it follows that if they did so act that action was nugatory and void."

This rule of statutory construction in Wisconsin may differ from the rule adopted and acted upon in like cases in other States, or from the rule which this Court would adopt or act upon if determining the question for itself, but nevertheless it is the rule which must be applied and must govern in this case. This Court is administering Wisconsin law and giving effect to Wisconsin statutes and Wisconsin rules of interpretation, as the Courts of the State would do. It is expounding the statute as it was expounded by the Court of last resort of the State at and before the time of the making of the contract, and has continued to be expounded since that time. It is expounding it as, under the highest judicial decisions of the State and upon the faith of such decisions, it must have been understood and acted upon by the parties at the time the contract was entered into. It is expounding it as, under such decisions, it must have been understood by the railroad company, under whom the plaintiff claims, at the time of its acceptance of the proposition and of the grading, tieing and building of the road on the faith of it. Acting and relying upon such exposition by the highest judicial authority of the State, the railroad company was induced to put its money into an enterprise of the greatest benefit to the county, where, without the aid so promised and contracted, and even almost with it, it was well known that the expenditure would be neither profitable nor remunerative, but must result in great actual loss to the company, as it has in point of fact since turned out. It was well known that the benefits to arise from the prosecution and completion of the work were very largely those of the people of the county; so the people thought and knew when they voted the aid, and so the company was induced to perform the work and expend its money that they might obtain the advantage which they sought, and for which, according to the decisions of the highest Court of the State, they did lawfully contract in part to pay. The question now is, whether they shall be permitted, through omission or perverseness of the board of supervisors or otherwise, to repudiate the obligation. Every principle of law, of honor and of justice demand that it should be fulfilled, and it is too late at this day, by any change of statutory construction or of the rules which govern it, either in this Court or any other, to alter or affect the rights and obligations of the parties.

Gelpecke vs. The City of Dubuque, 1 Wall., 175.
Havemeyer vs. Iowa County, 3 Wall., 194.

In *Aspinwall* v. *Commissioners of the County of Daviess*, this Court arrived at the conclusion that the affirmative vote did not constitute a contract between the county and the company, "with some reluctance," and said: "We have not been able to find that the Courts of Indiana have passed upon this clause of their Constitution, and have, therefore, been obliged to expound it with the best lights before us. We should have felt very much relieved if a construction had been given to it by the judicial authorities of the State, and have readily followed it." The relief so much desired by the Court in that case is not wanting in this, for by a series of decisions of the State Court giving a construction to the statute, and made both before and after the election in question, it is well settled by State judicial authority that an affirmative vote, accepted, acted upon and all its conditions complied with by the railroad company, does constitute a contract between the county and the company. It is well settled by those decisions in a manner to cause no "reluctance" on the part of the Court in following them. It is so settled in harmony with those principles of equity and justice which plainly ought to govern in the case.

The power to enter into contracts of this nature is one which may be well and consistently lodged with the voters at the polls. It has been so held by this Court as well as by others.

Town of East Lincoln vs. Davenport, 94 U. S., 801.
Supervisors vs. Wisconsin Central Railroad, 121 Mass., 460.
Bound vs. The Wisconsin Central Railroad Company, 45 Wis., 543.

It is submitted, therefore, that the proposition to aid in the construction of the road in the sum of fifty thousand dollars, authorized by the statute and affirmed by the votes of a majority of the electors, and which was accepted, acted upon and the road constructed by the railroad company through the county prior to the 10th day of March, 1870, constituted at that time a valid contract between the county and the railroad company, binding the county or its board of supervisors to issue and deliver the bonds in pursuance of the statute. It was not only a contract resting upon a valuable consideration, which the board of supervisors were bound to recognize and perform, but one the obligation of which could not be impaired by the so-called repealing act of March 25, 1872.

See Stockton Railroad Co. vs. Stockton, 51 Cal., 328.

And the satisfaction of the county board of supervisors under section seven of the act of 1864 was not a license to be obdurately and perversely dissatisfied without reason and against right. The statute does not authorize wanton dissatisfaction. This is the same question of power in a public officer to do an act in which the interests of the public or private rights are concerned, to which we have above adverted. The power in such case becomes a duty.

"If an official duty is to be performed by an officer on the happening of an event, he cannot capriciously refuse to perform it on the plea that he is not satisfied that it has happened. If the fact exists and is estaablished by proof, it is his legal duty to be satisfied and to perform the act."

Stockton Railroad Co. vs. Stockton, 51 Cal., 328.

II.

But if it can be said that no contract existed prior to the demand made upon the board of supervisors for the issue of the bonds, their action upon that occasion was such an acknowledgment and ratification of the action of the voters and of the railroad company as made it a contract in all respects valid and obligatory from that time forward. The board plainly signified its willingness and intention to give full effect to the will of the voters as expressed at the polls. The board plainly signified its assent to the contract, and such assent being given the contract became completely effective and binding, although performance was refused upon some ground which the board might have deemed sufficient, but which in point of law did not exist. The essential thing to be done by the board, the giving of its assent, if that can be deemed necessary, was done. There was then a meeting of all the minds having any power to act in the premises, and from that moment, if not before, the contract existed in entire legal and statutory perfection. "The board expressed themselves as willing to issue the bonds of the county," is the language of the record which it made or caused to be made of its proceedings. This consummated the contract, if such consummation were required under the statute, and it was not necessary for the board to proceed to the manual act of executing and delivering or causing the bonds to be executed and delivered in order to bind the county, any more than it is necessary that there should be an actual subscription for the stock of a railroad company where that is the proceeding authorized, in order that a contract should exist between the county and the company. It has been held that such subscription is not necessary to the creation of a contract in that class of cases, and the decisions apply with peculiar force and should govern in this.

County of Moultrie vs. Savings Bank, 92 U. S., 631.
Nugent vs. The Supervisors of Putnam County, 19 Wall., 241.

III.

The case is a proper one for equitable cognizance and relief.

First—This proposition was held by the Circuit Court in the action below originally brought by the plaintiff to recover damages for the failure to issue the bonds. That demurrer was sustained and the action dismissed on the ground that the remedy of the plaintiff was equitable and not legal. The Court so held upon what was denominated the equity of the statute in favor of the county. It was said to be obvious on the face of the statute, which declared that the bonds should have thirty years to run and carefully provided for the payment of interest from time to time and for the creation of a sinking fund from and after the fifteenth year after their issue, that the Legislature never intended that the county should be capable, through the omission of its board of supervisors or otherwise, of burdening itself with the entire debt with large accumulations of interest, all of which would be due and payable at once and by a single assessment or levy of taxes, if the action at law could be maintained. It was said not only that the Legislature never so intended and never gave the county this power, but that the voters did not so intend when they entered into the contract. It was said that such was not the contract of the voters, and that it would be enormously unjust and oppressive to the tax-payers and people of the county to load them with a debt of this nature, which neither they nor the Legislature ever contemplated or intended. Such an indebtedness was said not to be within the letter or spirit of the statute—not within its authority. The remedy was said to be not at law, where these unauthorized and oppressive consequences must follow, but in a Court of equity, which could shape and mould its judgment or decree to meet the exigencies of the case, and so as to conform to the spirit, purpose and authority of the statute and the manifest intention of the voters in entering into a contract under it. Such, in brief, were the chief reasons assigned by the Court for its decision, and it is submitted that the view of the law thus taken was sound and correct and should be upheld by this Court.

Second—The jurisdiction of the Court of equity, its power to take cognizance of and grant relief in nature of specific performance in cases like the present, is undoubted. The only question in such cases is, not whether the Court has power, but whether the power should be exercised. It is said to be the rule ordinarily prevailing that the Court will not exercise this jurisdiction and entertain a bill for a specific performance of contracts for the sale of chattels, or which relate to merchandise, but leaves the parties to their remedy at law, where such remedy is clear and adequate and where judgment in damages will fully compensate the parties for the wrongs of which they complain. But to this rule there are many exceptions in cases of sales of chattels, and it is a rule which has never been applied, certainly not in its rigor, to contracts either for the delivery or surrender of choses in action, or of other securities for the payment of money, whether public or private, and especially such as may be denominated public, the value of which is always more or less fluctuating and which are frequently found to be above par or commanding a large premium in the market. The contract here relates to certain public securities, with regard to which it will be found that Courts of equity have uniformly enforced specific performance. They are securities the value of which fluctuates from time to time, from day to day, and which often reaches a figure much beyond the sums denominated on their face with the interest. There are many municipal securities of the West and Northwest which to-day are much above par, and which cannot be obtained at any price almost in the markets. It is this peculiar nature of the security, this value which it possesses or may possess to the purchaser, and to which he is entitled by his contract, but which is incapable of calculation or just or accurate estimate at law, that renders the jurisdiction of equity peculiarly appropriate and effective. Since the convertibility of the securities into money at a premium, a consideration which enters into all purchases, is a matter of value which no Court or jury can measure or estimate, the remedy at law becomes inadequate and there is no efficient and proper remedy, except in equity, to compel the parties to do precisely as they agreed, which clearly ought not to be the cause of complaint or objection on the part of any one. It is upon this ground, among others, that equity, with its fondness for exact justice as near as may be between all parties, has assumed jurisdiction in cases of this nature, and that specific performance, under such regulations as the Court may adopt, has become a favorite and established remedy.

Notable among the cases showing exceptions to the general rule in relation to contracts concerning personalty, and showing that the rule for which we contend pertaining to contracts in regard to the delivery or surrender of choses in action or other securities for the payment of money is correct, are several which have arisen in and been decided by this Court.

In *Barr* v. *Lapsley*, 1 Wheat., 151, a bill in equity to obtain specific performance of an alleged agreement to receive a quantity of cotton bagging, at a specific price, in satisfaction of certain judgments at law, was entertained by this Court. In that case, as will be seen by the opinion, the bill was entertained and the cause examined and decided on its merits, and the decree dismissing the bill affirmed on the ground that the alleged contract was not proven. No question of the existence or propriety of the remedy sought by the complainant seems to have been made by Court or counsel.

In *The Mechanics' Bank of Alexandria* v. *Seton*, 1 Peters, 299, where the bill was filed to compel the bank to permit the transfer of certain stocks claimed by the complainants upon the books of the bank, and where objection was taken that the bill ought not to be entertained, this Court said: "With respect to the first objection, it has been said that a Court of chancery will not decree a specific performance of contracts except for the purchase of lands, or things which relate to the realty, and are of a permanent nature; and that where contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law. But notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books, *yet there are many cases to be found where specific performance of contracts relating to personalty have been enforced in chancery; and Courts will only weigh with greater nicety contracts of this description than such as relate to lands.*"

In *Clarke* v. *White*, 12 Peters, 178, a bill was filed to compel the defendant to deliver up to the complainant, in pursuance of an agreement for the extinguishment of the notes by a composition, certain notes made by the complainant and payable to the defendant. After the execution of the composition contract, the complainant delivered to the defendant certain goods agreed upon as the consideration for relinquishing the notes. The defendant refused to deliver up the notes, and the bill was filed to compel him to do so. The objection was made that no ground was laid for equitable relief by specific performance in equity. The Court said: "The relief prayed is the delivery to the complainant of instruments to which he is entitled. Not the execution of an executory contract, further than to decree the amount he has been compelled to pay Clagett and Washington, which is an incident to the exercise of jurisdiction that coerces the delivery of the instruments."

And in *Very* v. *Levy*, 13 How., 345, where the question was whether an agreement by a creditor to receive specific articles in satisfaction of a debt, in that case a debt upon bond secured by a mortgage, will be specifically enforced in equity and the creditor compelled to perform, and where the Court decided in the affirmative, the Court said: "An agreement by a creditor to receive specific articles in satisfaction of a money debt is binding on his conscience, and if he ask the aid of a Court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to receive it. *A Court of equity will go farther, and in a proper case will enforce the execution of such an agreement.* At law, a mere accord is not a defense, and before breach of a sealed instrument there is a technical rule, which prevents such an instrument from being discharged except by matter of as high a nature as the deed itself. But no such difficulties exist in equity. On the broad principle that what has been agreed to be done shall be considered as done, the Court will treat the creditor as if he had acted conscientiously and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a Court of law, in a case free from the technical difficulties above noticed, will do the same thing.

"In order, however, to bring a case within these principles, three things are necessary. An agreement, not inequitable in its terms and effect; a valuable consideration for such agreement; readiness to perform and the absence of laches on the part of the debtor."

The foregoing authorities in this Court are sufficiently illustrative of the jurisdiction of equity in this class of cases, and show that it may be properly invoked in a case like this. Here we have every element which renders the exercise of the jurisdiction proper and necessary. We have an agreement, not inequitable in terms and effect; a valuable consideration for such agreement; full performance of the agreement and the absence of laches on the part of the railroad company and the complainant; and a security to be delivered of very little, if it can be said to be of any less permanent nature than the titles to real estate as ordinarily dealt in and held in this country. The bonds have thirty years to run, the average period of human life, and the same character for permanency upon which equity assumes jurisdiction to specifically enforce agreements for annuities and other like securities.

See 1 Story Eq. Jur., Sec. 722.

And more than this, the statute under which the bonds are to be issued introduces some peculiar features, which render the remedy at law still more inadequate and that in equity still more appropriate. The interest is not to be paid by the county directly to the person entitled. The county is to pay it over year by year to the State Treasurer, who is to make the payments of interest. The county, by section five of the act, has a privilege which is also a duty, and which is a part of the contract with the bondholders, namely, after the fifteenth year from the date of the issue of the bonds the board of supervisors must levy an annual tax of not more than five per cent. of the bonds, to be paid over to the State Treasurer, who is required annually to apply the same to the payment of the outstanding bonds. If the holders were unwilling to have the amount thus anticipated, then the fund with its accumulations is to be invested in United States stocks and held to make the first payment. This convertibility may prove a valuable feature of these bonds to the county or to the holders. It introduces into the contract a peculiar element, inestimable by any rule of damages with which we are familiar.

And if we look to the English precedents we shall find them quite in harmony with the rulings of this Court. The only cases in which the English Courts of chancery now decline to enforce specific performance of contracts of this character are executory contracts for government stocks; holding the remedy at law adequate because they are always in the market and subject to but slight fluctuation of value. Contracts for the purchase, sale and delivery of railway shares will be specifically enforced at the suit of either the purchaser or vendor.

Cheale vs. Kenword, 3 De Jex & Jones, 27.
Duncruft vs. Albrecht, 12 Simons, 189, 199.
Doloret vs. Rothschild, 1 Sim. & Stu., 590.
Poole vs. Middleton, 29 Beavan, 646.
Shaw vs. Fisher, 5 De G., M. & G., 596, 608.

And the same doctrine has been adopted and acted upon by the Courts of this country.

Leach vs. Fobes, 11 Gray, 506, 510.
Todd vs. Taft, 7 Allen, 371.
Baldwin vs. Commonwealth, 11 Bush, 417.
Treasurer vs. Commercial Mining Co., 23 Cal., 390.
Cowles vs. Whitman, 10 Conn., 121.
Charter vs. San Francisco S. R. Co., 19 Cal., 200.

So far as the remedy is concerned, this contract for the issuance and delivery of county bonds is not distinguishable on principle from the contract for the sale and delivery of shares in a railway or other corporation. It stands upon the same footing. The amount of bonds to be issued by the county is limited by the statute to $50,000, and the same reasons exist for enforcing specific performance which prevailed in *Duncruft* v. *Albrecht,* where the Vice-Chancellor said: "There is not any sort of analogy between a quantity of three per cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description; which railway shares are limited in number, and which, as has been observed, are not always to be had in the market."

And again, why should equity refuse its aid in this case, when one of the consequences of such refusal is most likely to be, indeed almost certain to be, an effort at repudiation on the part of the county, if the burthen of the payment of the entire indebtedness with interest is cast at once upon the tax-payers and people of the county? Why should not equity in such a case relieve the creditor from the danger of repudiation, which has been too often experienced, as well as the tax-payers from an unjust and oppressive weight of debt which they never assumed and never intended to assume in that form? The creditor sues at law, where such must be the inevitable result of success on his part. The people, the tax-payers, come into Court and object on that ground, and their objection is sustained. Why should there not be specific performance in such case, where the debtor objects to any other process and points his creditor to that as his remedy? It is submitted that there clearly should.

But there are many other cases relating, not to realty or interests in realty, but to mere personalty or things in action, where equity enforces specific performance of contracts.

It has done so in the cases of contracts for the sale of debts.

Adderly vs. Dixon, 1 Sim. & Stu., 607.
Cutting vs. Dana, 25 N. J. Eq., 265.

It so enforces performance of agreements for insurance, and will compel the execution and delivery of policies.

Tayloe vs. Ins. Co., 9 How., 390.
Hughes vs. Piedmont Life Ins. Co., 55 Geo., 111.

It has enforced an agreement by the holder of certain notes to deliver them up to the maker to be canceled, although the notes were overdue.

Tuttle vs. Moore, 16 Minn., 123.

So an agreement to assign a contract between the plaintiff and a third person.

Woodward vs. Harris and Aspinwall, 3 Sandf., 272.

Contracts for the sale of patent right have frequently been specifically enforced.

Cogent vs. Gibson, 33 Beavan, 557.
Corbin vs. Tracy, 34 Conn., 325.
Somerby vs. Buntin, 118 Mass., 279.
Emery vs. Parrott, 107 Mass., 94.
Ely vs. McKay, 12 Allen, 323.

And so in cases where the complainant is not entitled to a specific performance, the Court nevertheless grants him relief by decreeing to him the repayment of the moneys expended on the faith of the contract.

Phillip vs. Thompson, 1 John. Ch'y, 131.
Parkhurst vs. Van Cortlandt, *Id.*, 273.
Green vs. Drummond, 31 Md., 71.

The necessity for equitable relief in this case and the inadequacy of any remedy at law is much greater here than in any of the cases which we have cited; while every principle which, in those cases, has been held a reason for relief in equity, appears in this bill.

And especially see also—

1 Story Eq. Jur., Secs. 717 and 717*a*; and
Duff vs. Fisher, 15 Cal., 375.

Third—In the present relation of the parties this proceeding and not mandamus is the proper remedy. Mandamus is applicable only to the fulfillment of such duties of a public nature as might be enforced by the prerogative writ, and not to the specific performance of contracts. It is not an appropriate remedy for the enforcement of contract rights of a private or personal nature, which rest wholly upon contract. A contrary doctrine would supersede by mandamus the ordinary forms of procedure in all cases where a municipal corporation owes a contract debt. For these reasons the jurisdiction in mandamus has not been extended to private contract rights.

State vs. Zanesville Turnpike Co., 16 Ohio St., 308.
Benson vs. Paull, 6 El. & Bl., 273.
State vs. County Court of Howard Co., 39 Mo., 375.

The fact that a contract obligation is to be enforced is decisive. That a defendant happens to be a municipal corporation does not modify the rule, if a contract is sought to be enforced against it.

Neither are these views in opposition to *Walkley* v. *Muscatine*, 6 Wall., 481, and *Rees* v. *Watertown*, 19 Wall., 107. Those were cases where the contracts had passed into judgments, and the question was one of remedial and auxiliary procedure to enforce payment of the judgment by compelling the levy and collection of a tax, which, after judgment under the operation of the statutes, had become a public official duty enjoined upon the proper officers of the city. There mandamus was held to be the proper remedy. The case at bar seeks to compel the execution of the evidences of an original right by specifically enforcing a contract for the delivery of the bonds which shall attest that right.

There may come a time when mandamus will be the proper and necessary remedy of the complainant. The

Federal Courts cannot issue it as an original remedy. They have no jurisdiction to do so except as auxiliary and essential to a jurisdiction already obtained.

Bath Co. vs. Amy, 13 Wall., 244.
Graham vs. Norton, 15 Wall., 427.

But the complainant has a right to sue or to come into the Federal Court to seek his redress, and from that right is derived the correlative duty of the Court to furnish and apply some instrumentality which will make the complainant's wrongs remediable by the Court. The Federal Courts having no original jurisdiction by mandamus, he of course is remediless as to that. The case has been held to be not one for damage; and for these reasons also this suit is properly brought in equity, as would doubtless be urged in a proceeding for mandamus, that the rights of the complainant have not that undoubted clearness which is indispensable to entitle him to that writ. In case of judgment no such objection can be made. Besides, this action is not against the ministerial officers of the county to compel them to do any duty. It is against the county, which, at the time this action was commenced, could only be sued in the name of its board of supervisors. It is against the county, the contracting party, to establish this right. Whether the Court will order the issue of the bonds, or give relief in some other form, is not now the question. The question is, whether the complainant is entitled to any relief whatever. The very fact that the remedy we seek here is an ample and complete one, a remedy which does entire justice between the parties, is a complete answer to any suggestion that mandamus is the proper remedy.

High on Extraordinary Remedies, Sec. 15, and cases cited.

But it seems almost like a waste of words, in view of the most recent utterance of this Court upon the subject, to discuss this proposition of the jurisdiction of equity, before judgment, to grant relief to creditors of these municipal corporations. The question is fully set at rest in a late case where a bill in equity by such a creditor was sustained.

Mount Pleasant vs. Beckwith, 100 U. S., 514.

Fourth—But it by no means follows if mandamus would lie that the remedy in equity would be denied. There are many cases where the remedies are concurrent, and the party entitled to a mandamus has obtained relief in equity.

High on Extraordinary Remedies, Sec. 21, and cases cited.

Nor does it by any means follow, because the plaintiff may have had an adequate remedy at law, that a Court of chancery will not entertain jurisdiction. This was held by this Court in a suit for specific performance.

Tayloe vs. Merchants' Fire Ins. Co., 9 How., 405.

And it is equally well settled that it is no answer to a bill for specific performance to say that the plaintiff can recover no damages at law.

Thompson vs. Harcourt, Bro. P. C., 193.

IV.

But it has been said, and will doubtless be said again in argument, that it appears on the face of the complaint that no sufficient notice was given of the election, and therefore that the election was void and no contract or obligation of any kind existed on the part of the county. Inasmuch as it appears on the face of the complaint that there was a full and fair vote upon the subject at every election precinct in the county, and that the electors generally must have had actual notice, it is quite immaterial under the decisions in Wisconsin whether strict, technical legal notice of the election was given or not. The election having been generally participated in by the great body of the voters, and presumptively known to all of them, the absence of the statutory notice did not invalidate it. This is well settled in Wisconsin, even where the election held is a special one to fill a vacancy, and not the general election prescribed by the constitution and laws.

The State vs. Orvis, 20 Wis., 235.
The State vs. Goetze, 22 Wis., 348.

The want of the statutory notice would not, therefore, vitiate even in a Court of law, and much less would it be held fatal in a Court of equity.

But the statutory notice given in this case, as appears on the face of the complaint, was not defective nor in any manner irregular or objectionable. In order to a proper understanding of this question, several section of the statutes of Wisconsin relating to the giving of notices of elections must be examined, and we quote first the general statutes upon the subject and shall afterwards examine the particular provisions of the act here under consideration. Sections 10 to 17, inclusive, of Chapter 7 of the Revised Statutes of 1858, as amended and in force at the time the election was held, read as follows:

"SECTION 10. The Secretary of State shall, between the first day of July and the first day of September in each year in which a Governor, Lieutenant Governor, Secretary of State, Treasurer, Attorney General and State Superintendent, or Representatives in Congress, are to be elected for a full term of office, or in which Electors of President and Vice President are to be elected, make and cause to be delivered to the sheriff of each county a notice in writing, stating that at the next general election the aforementioned State officers, and Electors of President and Vice President, and a Representative in Congress for the district to which such county shall belong, are to be elected, or so many of such officers as are then to be chosen.

"SECTION 11. If any vacancy shall exist in the offices either of Secretary of State, Treasurer, Attorney General, State Superintendent, State Senator, or Representative in Congress, proper to be supplied at the ensuing general election, one month before such election the Secretary of State, or, in case of a vacancy in such office, then the person officiating as such shall, thirty days at least before such election, give notice in writing to the sheriff of each county in the State, where the vacancy is in a State office; or, in case of such vacancy in a district, then to the sheriff of each county therein, specifying the cause of such vacancy, the name of the officer in whose office it occurred, and the time when his term of office will expire.

"SECTION 12. The Secretary of State shall, between the first day of July and the first day of September in each year in which the term of office of any State Senator in any district shall expire, make and cause to be delivered to the sheriff of the county composing such district, or to the sheriff of each county which shall form a part thereof, a notice in writing specifying the number of the district and name of the Senator whose term of service will so expire, and whose successor is to be elected at the next general election.

"SECTION 13. The Secretary of State shall cause a copy of each notice issued by him, and of each writ of election issued by the Governor for a special election, to be published in a paper printed at the seat of government once in each week from the date of such notice or writ until the election to which it shall refer.

"SECTION 14. All special elections for county offices, and *the filling of all vacancies in county offices at a general election*, shall be ordered by the sheriff of the county, which order shall be countersigned by the clerk of the board of supervisors; in all other cases of special elections they shall be ordered by the Governor.

"SECTION 15. Every order or writ issued for a special election shall specify the county or district in which such election is to be held, how the vacancy occurred, the time when his term of office will expire, and the day on which such election is to be held; which shall not be less than twenty nor more than forty days from the date of the order or writ, and the same shall be forthwith delivered to the sheriff of the county, or, in case of vacancy in a district composed of more than one county, then to the sheriff of each county in such district.

"SECTION 16. The sheriff, on receiving *either of the notices directed in this chapter to be sent to him*, shall forthwith cause a notice in writing to be delivered to the town clerk of each town, and to one of the inspectors of election in each ward in any city of his county; or if the vacancy be in an Assembly or Senate district within his county, then the notice shall be delivered to such officer in each ward or town in such district, which notice shall contain in substance the notices so received by such sheriff. [And he shall also cause a copy of each such notice to be published in a paper printed in his county, once in each week from the date of such notice until the election to which it shall refer, if there be a paper printed and published in his county.]

"SECTION 17. The town clerk of every town, or inspectors in any ward of any city, *ten days previous to any general election*, or on receiving either of the notices directed in this chapter to be delivered to him, shall give notice in writing, under his hand, to the electors of his town or ward of the time and place at which such election is to be held, and of the officers so to be chosen; *and if the notice is for a general election,* it shall state whether any of the officers then to be chosen are to fill vacancies, and the names of the last incumbents of the offices in which such vacancies exist; and such town clerk or inspectors shall cause such notices to be posted up conspicuously in at least five of the most conspicuous places in his town or ward."

The words inclosed in brackets, thus [ ], as part of section 16, is an amendment of that section enacted by chapter 350, Laws of 1860.

The first section of the act approved April 1, 1864, provided for the submission of the question of railroad aid at the annual town meeting to be held in 1864, or at any *subsequent* annual town meeting or *general election* held in the county, upon "*ten days' notice* of such submission to be given by the sheriff, by posting in each town in the county, in four public places, a written or printed notice stating that a submission of the question of railroad aid will be had." The last section enacted that, if from any cause the said question was not submitted to the electors at the annual town meeting in 1864, "it shall be submitted at any election or town meeting thereafter when any ten electors of said county shall file with the clerk of the county board of supervisors a petition therefor; and when such petition is thus filed, the said clerk shall give notice of the proposed submission of such question *in the same manner as notices of general elections* are now required by law to be given by the sheriff."

It will be observed that there is some conflict in the provisions of these two sections, both of which purport to regulate the manner of giving notice of submission in case it is made at *any subsequent election* or town meeting. The first section provides for the giving of ten days' notice by the *sheriff* by posting in four public places in each town.

The last provides that the *clerk* of the county board of supervisors shall give the notice in the manner required by law for the giving of notices of general elections by the sheriff. It is the office of judicial interpretation, and a rule by which Courts are always governed in such cases, to harmonize these two provisions, the last with the first, as far as possible. This is the rule of construction of all statutes in *pari materia*. It is obvious, for example, from the provisions of the first section that the Legislature deemed ten days' notice of the submission sufficient either for the annual town meeting of 1864 or for any subsequent annual town meeting or general election. No reason can be surmised or given why the Legislature should have deemed such notice sufficient and should have so expressly enacted by the first section, and yet should have changed its opinion and have intentionally provided for the giving of a different notice in this respect by the last section. No reason can be given why the Legislature should thus have acted at cross purposes in the same moment of time, and the undoubted truth is that the Legislature never in fact so intended. Having its attention particularly drawn in the first section to the time or length of notice to be given, and the manner of giving it, namely, by posting in four public places in each town for ten days, it cannot be doubted that it did not intend to change its purpose thus deliberately expressed by any provision enacted in the last section. It cannot be doubted on general principles, we say, that the Legislature did not so understand or intend, and unless the language of the last section is so clearly repugnant to that of the first as to exclude any possible harmonious construction of the two, a construction will be given which will reconcile the provisions of both, and so give effect to what we know was the clearly expressed legislative purpose and intent. And with the exception of requiring the notice to be given by the clerk instead of the sheriff, for which we know a reason existed, namely, that upon the coming in of the petition to the clerk it was more convenient to impose that duty upon him than to require the intervention of another officer, the sheriff, it will be found that there existed no substantial inconsistency between the two sections. Clearly the last section contains no other express words of conflict with the first, and if it is introduced it must be in some way by construction put upon the provisions of the general statutes regulating the manner of giving notice of general elections by the sheriff. A careful examination of the general statutes above quoted will show that no such conflict exists or need exist.

Section 10 of the general statutes, the first above quoted, provides for the delivery by the Secretary of State to the sheriff of each county of notice of election of certain State officers, therein named, of Representatives in Congress and of Electors of President and Vice President. That is a notice for the general election of those officers, and must be delivered by the Secretary between the first day of July and the first day of September in each year when such election is to take place.

Section 11 provides, when a vacancy shall exist in any State office, the office of State Senator or Representative in Congress, proper to be supplied at the ensuing general election, that the Secretary of State shall, at least thirty days before such election, give notice thereof to the sheriffs of the proper counties.

Section 12 provides for the giving of notice of the general election of State Senators, and declares that the Secretary of State shall deliver such notice to the sheriffs of the proper counties between the first day of July and the first day of September in each year.

Section 13 declares that the Secretary shall cause a copy of each such notice issued by him to be published in a newspaper printed at the seat of government.

Section 14 provides for the ordering of all special and all *general* elections of county officers. Such elections are to be ordered by the sheriff of the county.

Section 15 makes provision for orders and writs issued for special elections other than those ordered by the sheriff, and declares that such orders and writs shall be forthwith delivered to the sheriff, etc. The provisions of this section are not very material to our present inquiry.

Section 16 provides that the sheriff, on receiving either of the notices directed in this chapter to be sent to him, that is, the notices prescribed by sections 10, 11 and 12, shall forthwith cause a notice to be delivered to the town clerk of each town, and to one of the inspectors of election in each ward in any city of his county, which notice shall contain the substance of the notices so received by said sheriff. The section contains provisions for vacancies in Senate and Assembly districts not necessary to be noticed here, and then follows the amendment of 1860, relating to the publication of *each such notice* in some newspaper published in his county.

Section 17 declares the duties of town clerks and inspectors with respect to the posting of notices of election, which shall be done *ten days* previous to any general election.

The first question arising upon the construction of these statutes is as to the meaning and effect of the amendment of 1860 to section 16. Which notice is it that the sheriff is required by that amendment to publish in a paper printed in his county, the notice which he receives from the Secretary of State, or the notice which he is to cause to be delivered to the town clerks and inspectors? Both notices are spoken of in the section, and the amendment may be said to be ambiguous in this particular. It clearly is so. The substance of both notices is the same, and either, if published, would convey precisely the same information to the people. It is obvious the Legislature did not intend the publication of both, and the question is, which was intended? It may be conceded that either construction is admissible, but the context as well as other parts of the statutes favors the construction that it is the notice furnished by the Secretary of State which is intended. Section 13 provided for the publication by the Secretary of the notices issued by him in a paper printed at the seat of government, and the object of the amendment doubtless was to secure the like publication in each county in the State where a paper was printed. It is submitted that such is the better and the proper construction.

If we are correct in this last position, it follows that it was unnecessary there should be a publication of the notice of a general election given by the sheriff in any case, even if it appeared upon the face of the complaint, *though it does not*, that there was no publication of the notice given by the clerk of the county board of supervisors.

But another and very good reason for saying that no publication was required is that the statute providing for it in a certain class of cases was wholly unadapted to the nature and circumstances of this case. It could not be applied to it, certainly not in the sense of the objection taken by counsel on the other side, that there should have been at least six weeks' publication of the notice, and if not such a publication, then no publication was required. The contingency upon which the sheriff was required to publish, namely, "on receiving the notices directed to be sent to him by the Secretary of State," could not arise in this case. There was no notice to be sent by the Secretary of State, and hence no command of the law for publication. The command was conditional upon an event which could not happen in the giving of notice of the election in question, and hence when the act of 1864 spoke of the manner of giving notices of general elections by the sheriff, it is to be construed and meant only in such manner so far as the same was applicable to the circumstances of the case. It did not mean an impossibility, but, as the first section of it clearly shows the Legislature intended, it meant only that there should be *ten* days' notice by posting as required of town clerks and inspectors, acting under the sheriff, in giving notices of general elections as provided by section 17 of the general statutes.

But again, there was a class of general elections, viz., general elections of county officers, provided for in section 14 of the general statutes, where clearly no publication of the notice of election was required. Now which class of general elections, general elections for State and other like officers, or general elections for county officers, was it to which the Legislature referred in the act of 1864? Notices of general elections of county officers were given only by posting as provided in section 17, and the language of the act is general, not specifying which class of general elections is referred to. To which class will the Court by construction refer the words? Obviously, it is submitted, to the class of general county elections; first, because this election was a county election; and, secondly, because such construction is plainly in harmony with what we know was the expressed intention of the Legislature on the subject of notice. This view, it is submitted, ought to be conclusive of the question.

But a further, and, if possible, still more conclusive answer to the objection is that the amendment of 1860 only requires publication "if there be a paper printed and published in his county." It not only does not appear on the face of the complaint that there was no publication, but it does not appear that there was a paper printed and published in the county. If there was no paper printed and published in the county, a matter with respect to which we are not informed and of which Courts cannot take judicial notice, then no publication of notice was required in the case of any general election, and the only notice which could be given was given, viz., a notice by posting for the period of ten days in each town between the 24th day of October, 1867, the date of the petition, and the 5th day of November, 1867, the day of the election.

For these reasons it is confidently submitted that this objection to the notice, which at best is purely technical, is untenable and ought not to be sustained.

V.

The statute of limitation has not run upon the plaintiff's cause of action, and the demurrer upon that ground cannot be sustained The cause of action is subject to the ten years' and not the six years' bar.

The periods of limitation prescribed for the commencement of actions other than for the recovery of real property are, or were at the time of the commencement of this action, to be found in sections 14 to 22, inclusive, of chapter 138 of the Revised Statutes of Wisconsin of 1858. This case is not within section 17, which prescribes six years' limitation, and the first subdivision of which is relied upon by the defense. That section, all save the sixth subdivision, relating to actions for relief on the ground of fraud, has reference exclusively to actions at law, and not to actions for relief in equity. This action is governed by section 22, which is as follows: "An action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall accrue."

We are not aware that this question of statutory construction has ever arisen or been decided by the Supreme Court of Wisconsin, but the construction is well understood by the profession. Before the enactment of the Code of Procedure in 1857, and prior to the revision of 1858, the above section, instead of "an action for relief," read "a bill in equity."

The statute of limitations of Wisconsin, as well as the Code, were both borrowed from New York, and the question has arisen upon the very same statutes, and been decided by the Court of Appeals, which decisions we submit as conclusive, if any authority upon so plain a matter of statutory construction be needed.

Peters vs. Delaplaine, 49 N. Y., 362.
Hubbell vs. Sibley, 50 N. Y., 468.

It may be conceded that the action at law to recover damages upon the contract was barred at the end of six years, but that does not affect the equitable remedy or the action for specific performance, which is governed by a different statute. The expiration of the time limited for commencing an action at law does not bar the remedy in equity, as has been decided by the Wisconsin Court.

Kennedy vs. Knignt, 21 Wis., 340.
Whipple vs. Barnes, 21 Wis., 327.
Knox vs. Galligan, 21 Wis., 470.

It is submitted that the demurrer should have been overruled by the Court below, and that the decree of dismissal should be reversed.

L. S. DIXON,
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DENVER, SEPT. 8, 1880.